

*United States Court of Appeals
for the Second Circuit*



BRIEF FOR
APPELLEE

76-1279

To be argued by
DANIEL J. BELLER

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1279

UNITED STATES OF AMERICA,
Appellee,

—v.—

FRANK MOTEN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Frank Moten appeals from an order entered on May 25, 1976, in the United States District Court for the Southern District of New York, by the Honorable Richard Owen, United States District Judge, denying Moten's motion for reduction of bail.

Indictment 76 Cr. 324, filed April 5, 1976, charged Moten, and thirty-two other defendants, with conspiring to import and distribute heroin and cocaine, in violation of Title 21, United States Code, Sections 173, 174, 846 and 963. Moten was also charged with being the manager, organizer and supervisor of a continuing narcotics criminal enterprise, in violation of Title 21, United States Code, Section 848, and with four substantive counts of

possessing with intent to distribute narcotic drugs, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial of this Indictment commenced as to twenty-two defendants * on August 10, 1976 ** and is presently in progress.

Statement of Facts

A. Introduction

The Indictment in this case charges thirty-three defendants with engaging in the distribution of heroin and cocaine from 1968 to 1975. A group of Miami defendants, led by Juan Antonio Alvarez and Angel Rodriguez, brought approximately 100 kilograms of cocaine from Florida to New York in each of those years. At the same time, the New York core group was purchasing multi-kilogram amounts of heroin from other distributors. The heroin and cocaine were then resold to bulk purchasers from New York, New Jersey, Washington and as far west as Chicago, Illinois.

* Defendants John Capra, Leo Guarino, Steven DeSavva, Solon Glaze and Helen Kellem were severed, on their own motion, prior to trial. Defendant Ann Reynolds was severed on the Government's motion on the morning of trial, and will testify at trial as a Government witness. Two defendants, Michael Farkeer and Jose Luis Sureda, have entered pleas of guilty and will testify at the trial. The defendant Albert Lee Williams is a federal narcotics fugitive on a previous case and has not yet been arrested on this Indictment.

** Three defendants, Frank Moten, Don Wilson and John Morris are presently incarcerated, having failed to post bond. Trial of this Indictment was initially set for July 19, 1976, to comply with the ninety-day rule for incarcerated defendants. Due to the filing of voluminous pre-trial motions, the trial date was adjourned until August 10, 1976.

The defendant Moten plays the central role in this case of financing the operations of the core-group distributor, Jack Brown, of introducing various defendants to him for the purpose of selling narcotics, of financing their purchases, and of selling and purchasing narcotics in his own right. If convicted, Moten faces terms of imprisonment of up to fifteen years for each of four substantive offenses, a term of five to twenty years on the conspiracy count, and a term of ten years to life on the continuing criminal enterprise count ("life count").

B. Prior Proceedings

Moten was taken into custody on April 23, 1976. After lengthy proceedings, bail was set by United States Magistrate Leonard H. Bernikow in the amount of \$600,000 cash or surety bond.* On April 26, 1976, an extensive application for reduction of bail was presented to the Honorable Lloyd F. MacMahon, then sitting in the arraignment Part. Arnold Brown, Esq., counsel to Moten, presented to the Court basically the same arguments which are presented to this Court in the present appeal—arguments concerning the expected evidence against the defendant, his alleged ties to the community, his past record of Court appearances, and his character—and additional ones as well. After hearing oral argument the motion for a reduction of bail was denied. A motion to reargue was denied on April 27, 1976.

On April 29, 1976, the Honorable Richard Owen, who had been assigned to the case after arraignment, entertained a new motion to reduce bail. After extensive argument, the Court maintained the bond at \$600,000.

* The Government had requested a \$1 million surety bond.

Thereafter, Moten secured new counsel, Nancy Rosner, who filed a written motion to reduce bail before Judge Owen on May 23, 1976. On May 25, 1976, the District Judge denied Moten's motion to reduce bail. This appeal followed.

C. The District Judge's Opinion of April 29, 1976

On April 29, 1976, after argument, the District Judge maintained the bail previously set by Magistrate Bernikow and twice affirmed by the arraignment Judge. The Court made the following findings:

"I find that the nature of the charges are such that they are serious, that the potential sentence in the event there were to be a conviction is so substantial as to create a great motive to flee.

I find that there is an ability to flee that is unusual. I am advised there is an association with others in the criminal area, including those who have fled from prior criminal charges. That given the background here of extensive gambling, of possession of stolen jewelry in large amounts, that there is a potential, there is disclosed a probable possession of assets of an enormous amount; and based upon the foregoing as revealed to me on this argument I find that this bail is entirely appropriate." (H. Tr. 4/29/76, at 47-48).

These findings are entirely supported by the record of proceedings before the District Court.

That the charges are serious cannot seriously be disputed. Moten is charged with a conspiracy (5-20 years), and four substantive narcotics violations (0-15 years) on each count, and with managing a continuing

criminal enterprise (10 years-life). The Indictment accurately describes Moten's role in this case as a narcotics banker, who introduced other defendants and co-conspirators to the core supplier for the purpose of purchasing drugs, who delivered drugs to the core supplier, who washed money, sold kilogram quantities of cocaine on at least two occasions, vouched for the purchase of drugs by defendants on trial, and who shared in the enormous profits of the conspiracy.

The potential sentence in this case, if Moten is convicted, creates an overwhelming motive to flee. The enormity of that motive has already been established in this very case, inasmuch as the defendant Juan Antonio Alvarez, the principal supplier of cocaine to this conspiracy, who is also charged with a "life count," has jumped bail of \$600,000 and is presently a fugitive.* Alvarez's bail was initially set at \$1 million by a Florida Magistrate who subsequently reduced the bond to \$100,000 over strenuous Government objection. The bond was thereafter increased in New York, with the defendant posting an additional \$400,000 property as collateral. Alvarez's fugitivity once again demonstrates that in cases of this type, where enormous profits have been amassed and the penalty after conviction is substantial, even relatively high bail is no guaranty of appearance.

Moreover, Moten's ability to flee is amply demonstrated by the record of the April 29th hearing. In December, 1974, agents of the Federal Bureau of Investigation seized property pursuant to search warrants from Moten's home in Englewood, New Jersey, and a

* Alvarez is being tried in absentia under the authority of *United States v. Tortora*, 464 F.2d 1202 (2d Cir. 1972).

"laundromat" operated by him in Harlem. Gambling records for a period of sixty-nine days were found in Moten's home and analyzed by auditors of the Internal Revenue Service. The audit disclosed that Moten earned approximately \$1 million during that period, or approximately \$5 million annually from that operation.* In addition, agents found stolen jewels valued at approximately \$136,000 in Moten's home. Seizures from Moten's safe deposit boxes in various banks disclosed jewelry and other items valued at \$172,000, including diamond rings valued at \$121,000, all of which were the subject of an IRS jeopardy assessment against Moten based on earnings in excess of \$1 million which has been upheld by the District Court in New Jersey.

Moten also has substantial overseas connections which might offer him a comfortable harbor as a fugitive.

* The network of Moten's illegal operations extends far beyond New York. Moten was indicted for operating large scale gambling enterprises in Atlanta, Georgia in February, 1975, along with other defendants. The case went to trial in November, 1975, resulting in the conviction of all defendants on trial. On the eve of trial, Moten, who was released on bail in that case, claimed an inability to stand trial because of a heart condition and submitted a medical report to that effect. Moten, the principal defendant, was severed from that case, and has still not been brought to trial.

On the first day of trial in this case, Moten claimed to be suffering from heart spasms as a result of the failure of Metropolitan Correctional Center officials to administer to him his prescribed medicine for the preceding two weeks. After checking with the MCC, the District Judge observed he had been informed that Moten had allowed his prescription to lapse. It is believed that in order to avoid trial in Atlanta, Moten simply stopped taking pills for his angina condition. These machinations are hardly consistent with his constantly professed willingness to stand trial on all charges brought against him.

Moten owns condominium apartments in the Bahamas, has business interests in Zaire, and is believed to have invested in real estate in Spain. Moten is an associate of Frank Mathews, presently a fugitive from a federal narcotics indictment on which he was released on bond in excess of \$1 million. Moten is also an associate of Zack Robinson, a federal narcotics fugitive who has been missing for more than one year.

Moten's prior criminal record, while sprinkled with arrests, is clear of any but a minor conviction. This is not surprising in view of Moten's close association with law enforcement officials and reputation as a corrupter of police. His bodyguard, and associate in criminal ventures, James Harding, is a former lieutenant in the New York Police Department. Harding was convicted in the Atlanta gambling case noted earlier. Moten has had extensive unauthorized contacts with agents of the Internal Revenue Service and with police officers and has had access to indictments and official information prior to their disclosure.

Moten is also known to be the organizer and driving force behind the Council of Twelve, an organization of highly placed organized crime figures who control decision-making for organized crime activity in Harlem. In these activities he is associated with Nicki Barnes, believed to be New York's biggest supplier of narcotic drugs.

Moten suggests that the charges against him cannot be proven because they rest on the testimony of two witnesses, John Brown and Marion Ladd. While Moten suggests infirmities in Brown which will render his testimony incompetent, it is interesting to note that several of the defendants, when confronted with the accusations in the Indictment, agreed to plead guilty

and cooperate with the Government. Moreover, the eve-of-trial fugitivity of the defendant Juan Antonio Alvarez is eloquent testimony to the truthfulness of Brown's statements.

Moten also suggests that the witness Marion Ladd's testimony will not be credible and that a previous jury rejected her testimony in another case. Wholly apart from the fact that Ladd was a minor witness at that trial, Moten conveniently neglects to apprise the Court of the twenty-seven narcotics convictions which were the direct result of Ladd's cooperation in prior cases.

Moten argues in this appeal that he surrendered himself after being informed of the charges, thereby demonstrating an absence of intent to flee. The circumstances relating to this claim, and the prior proceedings, require some elaboration.

On April 21, 1976, a warrant for the arrest of Frank Moten was unsealed in the United States District Court for the Southern District of New York. Moten was taken into custody on April 23, 1976. In an affidavit submitted to the District Judge in connection with Moten's last application for a reduction of bail, Nancy Rosner, in a sworn affidavit, stated that her client had "surrendered himself after being informed of the charges without so much as a phone call to attempt to negotiate bail or otherwise reach an agreement with the Government regarding his surrender." (H. Tr. 5/25/1976, at 2).

The facts, however, are far different. Moten learned on Wednesday, April 21, 1976, that federal agents had been to his home in Englewood, New Jersey. On Thursday, April 22, 1976 at 11:30 A.M., Assistant United States Attorney Daniel Beller received a telephone call from Moten's attorney, Arnold Brown, who sought to

negotiate bail terms under which Moten would be willing to surrender. Moten's attorney was advised that the Government would not engage in such discussions. When asked to disclose his client's whereabouts, Brown stated he would get back to the Government and hung up.* It was not until approximately twenty-six hours later, after twenty-four-hour surveillance by a half-a-hundred federal and city law enforcement officials at Moten's residence and hang-outs, that Moten finally surrendered.

After being apprised of counsel's misrepresentations ** and the circumstances of Moten's surrender, the Court concluded that Moten knew at least on the morning of April 22, 1976 that he was wanted by federal agents, that he did not surrender until first making efforts to negotiate favorable conditions of release, and that he waited a substantial period of time, while his home and other locations were under constant surveillance, before surrendering.

Moten also argues that he has strong ties to the community and is a man of good character, as shown by various letters submitted in his behalf to that effect. The District Judge found these letters less than persuasive *** on the issue of his appearing for trial. (H. Tr. 5/25/76, at 9). The Court also observed that even

* Beller kept a memorandum of this telephone call.

** Since Mrs. Rosner was not Moten's attorney at the time of his surrender, the misrepresentation appears to have been inadvertent.

*** This would be so even were it not the case that the second, third and seventh letters appear to have been composed on the same typewriter and that the letter from Rev. Mikael incorrectly states that Moten is a "long-time resident and citizen of the City of New York." While Moten's illegal activities have been centered in New York City, he has lived in Englewood, New Jersey, since 1965.

as late as May 25, 1976, aftr the final set of papers had been submitted on the motion for reduction of bail, the Court had not received

"any information in any competent manner as to what [Moten] does for a living, how much money he makes, where he comes from, how he spends it, where he banks. Normally, in a bail situation, the defendant is willing to come in with some substantial amount of information about assets and income and jobs and how long he has held the job and wealth or lack of it or what have you. I have absolutely no financial information that would be expected on a bail application and this is the third application—the fourth one, one before the Magistrate, one before Judge MacMahon and two before me and this has never been furnished.

This suggests, I submit, a situation in the defendant that the defendant for reasons of his own is unwilling to make any such disclosure and such an attitude it seems to me is inconsistent with the reduction of bail, given the complete picture that I believe I have received earlier." (H. Tr. 5/25/76, at 9-10).*

Finally, counsel's brief on appeal, as did her affidavit below, vouches that "Frank Moten wouldn't flee if released on his own recognizance." (Br. 13). Counsel's

* Moten's failure to furnish such information, like his failure to post bond in this case, is easily explained. The Government is required to show as part of its proof on the "life count" that Moten earned substantial resources in the course of his narcotics activities. Moten fears that if he posts \$600,000 bail, or furnishes accurate records concerning his financial situation, he will be supplying additional evidence of his vast economic resources as part of the proof at trial.

track record in this regard hardly inspires confidence. In the case of *United States v. Papa*, 74 Cr. 1082, based upon a similar assurance by Mrs. Rosner, then acting as counsel for co-defendant Anthony Stanzione, the Hon. Charles Brieant, District Judge, ordered Stanzione's bail reduced from \$500,000 cash or surety, to a personal recognizance bond in that amount, secured by \$100,000 cash, and an additional \$100,000 bond from a separate Indictment. Stanzione was released and after lingering long enough to tend to his affairs and receive the Government's discovery vanished from sight.

ARGUMENT

Moten's appeal is frivolous and should be rejected.

It is clear that a district court's determination of a reasonable bail amount will not be disturbed absent a clear showing that the lower court has abused its discretion and that the proceedings below do not support the bail determination. 18 U.S.C. § 3147(b). In this case, three judges on five different occasions have carefully considered the arguments of counsel and set bail in accordance with the facts and circumstances of the case. The District Judge most familiar with the case, who at the time of this appeal will have heard approximately six weeks of testimony in the Government's case, has twice carefully considered and rejected the very same arguments presented in this appeal. The other principal defendant in this case, Juan Antonio Alvarez, has already jumped bail of \$600,000. It has become all too frequent, particularly in substantial narcotics cases, for defendants, who have made millions of dollars in their illegal ventures, to seek release upon, what is for them, insubstantial bond, await the outcome of pre-trial pro-

ceedings, secretly liquidate assets that have not been posted as collateral and, when the reality of an impending trial and conviction become apparent, flee the jurisdiction. The trial of this case is already in progress and this Court should not disturb the carefully considered judgment of the District Court judges who have set and maintained bail in this case.

CONCLUSION

The order appealed from should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

Daniel Bell being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 2d day of *September*, 1976,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

*Ms. Nancy Rosner
401 Broadway
New York, N.Y. 10013*

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Daniel Bell

Sworn to before me this

*2nd day of September
Alma Hanson*

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978